Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5995

VERNON SMITH and BILLY KIMMEL — PETITIONERS

V.

DONALD E. BORDENKIRCHER, SUPERINTENDENT,
KENTUCKY STATE PENITENTIARY — RESPONDENT

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Whether there exists a conflict between the decisions of this Court, the court below and the various circuit courts of appeals of such magnitude as to warrant the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion below from the United States Court of Appeals for the Sixth Circuit is styled Vernon Smith and Billy Kimmel vs. Donald E. Bordenkircher and is unpublished. On November 30, 1979, the court below denied petitioners' request for a rehearing. On January 4, 1980, the court below issued its mandate. The opinion of the United States Court of Appeals for the Sixth Circuit and the Order denying the petitioners' request for a rehearing are all correctly set forth in the attachment to the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Sixth and Fourteenth Amendments to the United States Constitution.

JURISDICTION

Petitioners' application for a writ of certiorari complies with the prerequisites of 28 U.S.C. 1254(1). The petitioners, however, have failed to demonstrate a conflict of such magnitude as to warrant a review of the opinion below. See Rule 19(1)(b). Accordingly the petition should be denied.

COUNTERSTATEMENT OF THE CASE

The respondent accepts as being substantially correct the procedural history and material facts as presented in the petition. Certain aspects of the underlying facts, however, are in need of clarification.

This action originated in the Muhlenberg Circuit Court of the Commonwealth of Kentucky. After a jury trial, the petitioners, Vernon Smith and Billy Kimmel, were convicted of murder and sentenced to life imprisonment. The petitioners pursued a direct appeal to the Supreme Court of Kentucky. Among the arguments raised by the petitioners was the contention that trial counsel was ineffective due to a conflict of interest arising from trial counsel's former representation of Shirley Smith. Without addressing the merits of this contention, the Supreme Court of Kentucky affirmed the judgment in a memorandum opinion.

The petitioners subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Kentucky at Owensboro. In the petition, Vernon Smith and Billy Kimmel alleged that trial counsel was ineffective because of a conflict of interest. The respondent filed an answer and motion to dismiss. Accompanying these pleadings were portions of the trial record which reflected that prior to trial, trial counsel jointly represented Shirley Smith, Vernon Smith and Billy Kimmel. Prior to trial, Shirley Smith elected to plead guilty and to testify at trial as a witness for the prosecution. Upon learning of this decision, trial counsel, the Honorable A. G. Rhea, filed a motion to withdraw as counsel for Shirley Smith. This motion was granted. At no time did Mr. Rhea allege that his prior representation of Shirley Smith prevented him from effectively representing Vernon Smith and Billy Kimmel.

On November 21, 1978, the district court rendered its judgment and dismissed the petition for a writ of habeas corpus. In its Memorandum Opinion the district court noted that the petitioners failed to specify in what manner counsel may have been restricted in his cross-examination of Shirley Smith. The district court concluded that the petitioners were not deprived of effective representation of counsel.

On appeal to the United States Court of Appeals for the Sixth Circuit, the petitioners urged the appellate court to reverse the judgment of the district court. The Sixth Circuit rejected this contention and affirmed by holding:

"Smith and Kimmel argue that, because of this prior representation, the trial counsel was unable to cross-examine the co-indictee on the basis of damaging information protected by the attorney-client privilege. The District Court dismissed the petition on the merits.

"We have held that a showing of prejudice is a prerequisite to relief where alleged conflicts of interest deprive defendants of their Sixth Amendment right to counsel. United States v. Steele, 576 F.2d 111, 112 (6th Cir. 1978). There has been no showing of actual prejudice in the case. Nor could there be. No other attorney could have asked the co-indictee cross-examination questions derived from confidential statements that she had made to trial counsel; the attorney-client privilege would have prevented trial counsel from divulging such information to another attorney who acted in his place. We do not believe, therefore, that the defense of Smith and Kimmel was any less full or effective than it otherwise could have been but for the prior representation of the co-indictee by trial counsel."

The petitioners now urge this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

REASONS FOR NOT GRANTING THE WRIT

ARGUMENT

CONFLICT BETWEEN THIS COURT'S DECISION, THE OPINION OF THE COURT BELOW AND THE VARIOUS CIRCUIT COURTS OF APPEALS IS NOT OF SUCH MAGNITUDE AS TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Rule 19(1)(b) provides in part:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . .or has decided a federal question in a way in conflict with applicable decisions of this court . . ."

In an effort to comply with the provisions of this rule, the petitioners present three separate arguments in which they allege (1) that the opinion of the court below is in conflict with this Court's decision in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); (2) that the opinion of the

court below is in conflict with the decisions of various other circuit courts of appeals; and (3) that the court below should have specifically addressed the question of whether the state trial court was under an obligation to sua sponte conduct a hearing as to the possibility of a conflicting interest arising from the petitioners' counsel's former representation of a state witness. Since the petitioners' arguments are overlapping and repetitive, the respondent will refute these allegations in a single argument.

The facts involved in the petitioners' allegation of error arise from the fact that they, as well as Shirley Smith, originally retained A. G. Rhea as counsel to represent them on a murder charge in the Muhlenberg County Circuit Court. However, subsequent to their retention of Mr. Rhea as counsel, the indictment against Shirley Smith was dismissed in exchange for her testimony as a prosecuting witness. The petitioners allege that her testimony at trial was substantially different from the version of facts that she originally told Mr. Rhea. At trial Mr. Rhea did not indicate that he was inhibited in his cross-examination of Shirley Smith.

From the record it is abundantly clear that there did not exist a conflict of interest situation as envisioned in Holloway v. Arkansas, supra.

In the instant case, Mr. Rhea, as attorney for Vernon Smith, Billy Kimmel and Shirley Smith, moved to withdraw as Ms. Smith's attorney upon his recognition of the apparent conflict arising out of the statement which Ms. Smith gave to the Commonwealth. At that point Mr. Rhea was confronted with the decision of whether to represent Shirley Smith or the petitioners. Mr. Rhea's decision to represent the petitioners, as well as the trial court's decision to grant Mr. Rhea's motion to withdraw as Ms. Smith's attorney, rectified any conflict of interest which might have arisen. Since Mr. Rhea was not forced to assume a position of ambivalence toward the petitioners, and since he was professionally charged with the assistance of only the petitioners and had no concurrent

obligation to professionally assist Ms. Smith, any allegation of a conflict of interest situation on his part is unfounded.

The petitioners nevertheless allege that as a result of the previous confidential relationship existing between the prosecution witness and their attorney, they, as defendants, were not permitted to fully cross-examine the witness. However, since there is no indication of the manner and reason for the allegedly restricted cross-examination or what lines of inquiry were frustrated, this amounts to nothing more than a hypothetical possibility of prejudice. As was noted in United States v. Steele, 576 F.2d 111 (6th Cir. 1978), cert.den. 99 S.Ct. 313, the petitioners must demonstrate, in the absence of a showing of actual conflict, that the joint representation was prejudicial. Consequently, the claim by petitioners that they were denied the opportunity to fully cross-examine the prosecution witness involves a hypothetical conflict which is insufficient to constitute reversible error in the instant case. See United States v. Ringo, 470 F.2d 1099 (3rd Cir. 1973).

In their first argument, the petitioners place great reliance on the recent United States Supreme Court decision in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), as support for their allegation that they were deprived of their right to effective assistance of counsel due to their attorney's conflicting interests. The respondent again respectfully disagrees and submits that the decision in Holloway, supra, has no applicability whatsoever to the facts and circumstances involved in the instant case.

The facts and circumstances involved in the Holloway, supra, case are immediately distinguishable from those involved in the instant case. The conflict of interest situation dealt with in Holloway involved an attorney who was charged with the responsibility of representing three co-defendants. In the instant case no such situation is involved. In the case at bar we are dealing with two co-defendants who, of their own choosing, were

represented by a single attorney. At no point do the petitioners allege ineffective assistance of counsel due to a conflict of interest arising out of their attorney's representation of them as co-defendants as was the situation in the Holloway case. Rather, the co-defendants now allege that their attorney was unable to provide effective assistance of counsel as a result of his former representation of a prosecution witness. As such, the facts involved in, and consequently the Opinion resulting from the Holloway case, are readily distinguishable from the case at bar. Consequently, this Court's Opinion in Holloway should not be considered of guiding precedence in the instant case.

For much the same reason, the petitioners' assertion that the opinion below conflicts with the various circuit courts of appeals is untenable. In United States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978), and United States v. Vargas-Martinez, 569 F.2d 1102 (9th Cir. 1978), the Third and Ninth Circuits were concerned with the issue of whether a defendant had a right to a particular counsel when it was demonstrated that an actual or potential conflict of interest existed. Neither of these two cases stands for the proposition that such a situation as described in the case at bar would result in an automatic reversal of the conviction. With the sole exception of an Illinois opinion, none of the petitioners' citations support their allegation that the opinion is in serious conflict with the opinions of the other circuits. In point of fact, the rule is well established that in the absence of an actual conflict arising from a joint ongoing representation, prejudice must be demonstrated before the Court will grant relief. United States v. Di Carlo, 575 F.2d 952 (1st Cir. 1978), cert. den. 99 S.Ct. 115; United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977); Thacker v. Bordenkircher, 590 F.2d 640 (6th Cir. 1979);[1] United States v.

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1 Petitioners' reliance on this case in their petition is misleading. In short, the petitioners quoted this case out of context.

Atkinson, 565 F.2d 1283 (4th Cir. 1977), cert. den. 436 U.S. 944. In light of these opinions, it is clear that the petitioners have failed to satisfy the prerequisites of Rule 19.

As a final argument, the petitioners argue that this Court's opinion in Holloway requires a trial court to sua sponte conduct a hearing if it perceives a conflict of interest. As has been previously noted, the conflict of interest had been resolved and there was therefore no need for a hearing. Furthermore, this Court has never held that the failure to conduct such a hearing would compel the reversal of a criminal conviction. The circuit below as well as several other circuits have held that a hearing, although desirable, is not constitutionally required. United States v. Steele, supra; United States v. Alberti, 470 F.2d 878 (2nd Cir. 1972), cert. den. 411 U.S. 919; United States v. Medel, 592 F.2d 1305 (5th Cir. 1979), reh. den. 597 F.2d 772 (1979).

In the course of this brief, the respondent has shown that the opinion below neither conflicts with Holloway v. Arkansas or with the opinions of the various circuit courts of appeals. The petitioners have failed to establish the existence of a conflict of such magnitude as to warrant the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of March, 1980, I served the petitioners with Brief for Respondent in Opposition to Petition for Writ of Certiorari by placing three (3) copies of the same in the United States mail, first-class postage prepaid, and addressed to the Honorable William M. Radigan, Assistant Public Advocate, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Petitioners.

George M. Geoghegan Jr.

George M. Geoghegan Jr.
Assistant Deputy Attorney General